IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 6637 of 2012-D

Reserved on : 26.02.2013

Decided on : 28.02.2013

Seema Sharma, wife of Shri Shashi Bhushan Sharma, resident of Village Dhagoh, Post Office Dhami, Tehsil and District Shimla, H.P.

...Petitioner.

-Versus-

1. Lokayukta Himachal Pradesh through its Secretary, Pine Grove Building, Near Raj Bhavan, Shimla-2, Tehsil and District Shimla, H.P.

2. Himachal Pradesh Subordinate Service Selection Board through its Secretary Hamirpur, District Hamirpur, H.P.

3. State of Himachal Pradesh through Principal Secretary (Home) to the Government of Himachal Pradesh at Shimla.

...Respondents.

Coram:
The Hon'ble Mr. Justice Rajiv Sharma, Judge.
Whether approved for reporting?[1] *Yes.*

For the petitioner : Mr. Ajay Mohan Goel, Advocate.

For respondents No.1 and 3 : Mr. Pramod Thakur, Additional Advocate General, with Mr. Neeraj K. Sharma, Deputy Advocate General.

For respondent No. 2 : Mr. Rajesh Kumar, Advocate.

Rajiv Sharma, Judge:

The respondent No. 2 has issued an advertisement No. 11/2007 on 12.07.2007, whereby applications were invited for filling up the posts of Junior Scale Stenographers. Petitioner participated in the selection process. Petitioner's name was recommended by the respondent No. 2 to the respondent No. 1 on 07.10.2008. However, the petitioner was offered appointment on contract basis. Thereafter, the petitioner submitted her

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[1] *Whether the reporters of the local papers may be allowed to see the judgment? Yes.*

joining on 01.01.2009 and an agreement was also signed on 01.01.2009.

2. Mr. Ajay Mohan Goel, learned counsel for the petitioner has strenuously argued that the action of respondent No. 1 to appoint the petitioner on contract basis instead of regular basis is illegal, arbitrary, unjustified and, thus, violative of Articles 14 and 16 of the Constitution of India. He then contended that the entire selection process commencing from advertisement to the recommendation, was for regular post and not for contractual post.

3. Mr. Pramod Thakur, learned Additional Advocate General, appearing on behalf of respondents No. 1 and 3, has vehemently argued that the appointment of the petitioner on contractual post has been made as per policy decision, dated 12.12.2003. He also argued that since the petitioner has already joined her duties on contract basis, the principles of acquiescence and waiver would apply.

4. Mr. Rajesh Kumar, learned counsel for respondent No. 2 has submitted that the recommendation of the petitioner's name for appointment to the post of Junior Scale Stenographer was made by respondent No. 1 strictly as per the requisition.

5. I have heard the learned counsel for the parties and gone through the pleadings carefully.

6. Petitioner has earlier approached this Court by way of CWP No. 7769 of 2010-I. The same was decided by this Court on 20.03.2012. In sequel to the judgment, dated 20.03.2012, the Hon'ble Lokayukta has passed the order on 12.06.2012.

7. The petitioner has placed on record the relevant extract of the noting portion vide Annexure PR-1, whereby the

process for filling up two posts of Junior Scale Stenographers and one post of Jamadar was initiated. According to paragraph No. 304, the Recruitment and Promotion Rules for the post of Junior Scale Stenographer were already notified by the Home Department, Government of Himachal Pradesh vide letter, dated 28.03.1995, which were still in vogue. The permission was sought vide paragraph No. 306 to advertise the posts by sending the requisition to the Employment Exchanges. Paragraph No. 308 reads as under:

> *"As per R & P rules for the post of Junior Scale Stenographer in the office of Lokayukta, H.P. notified by the H.P. Govt. (Vig. Deptt.) on dated 28.03.1995, may kindly be seen at flag 'A' in column no. method of recruitment is as under.*
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> *10. Method of recruitment (1) 100% by direct recruitment.*
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> *Whether by direct recruitment or by promotion, deputation, transfer and the vacancies to be filled in by various methods (2) Notwithstanding anything contained in clause (1) of Col. 10, supra, the incumbents already taken on deputation will be given option for absorption in the office of Lokayukta, H.P. and the incumbent(s) who opt for absorption shall from the initial cadre of the above post and thereafter the direct recruitment shall be resorted to as provided in clause (1) above."*

8. According to paragraph No. 309, it was proposed that the post of Junior Scale Stenographer is to be filled up 100% by direct recruitment, as provided in the Recruitment and Promotion Rules. According to paragraph No. 315, the requisition for the post of Junior Scale Stenographer, as suggested, was ordered to be sent accordingly.

9. Now, as far as the post of Jamadar is concerned, as per paragraph No. 316, the same was to be filled up by selection,

as suggested in draft recruitment rules for the post, from amongst the staff falling in the categories of Peon, Sweeper and Chowkidar. Consequently, the requisition was sent to the respondent No. 2 for appointment of two posts of Junior Scale Stenographers in the pay scale of ₹4020-6200+₹150/- S.A.

10. The Government of Himachal Pradesh has framed the Rules under Article 309 of the Constitution of India called 'The office of Lokayukta, Himachal Pradesh, Junior Scale Stenographer, Grade-II (Class-III Non-Gazetted) Services, Recruitment & Promotion Rules, 1995 on 28th March, 1995. As per the Recruitment and Promotion Rules, the post of Junior Scale Stenographer is to be filled up 100% by direct recruitment. The minimum educational qualification has been prescribed under Rule-7.

11. A policy decision has been taken by the State of Himachal Pradesh on 12.12.2003 prescribing the provision for appointment on contract basis. The text of letter, dated 12.12.2003 reads as under:

> *"I am directed to say that it has been decided by the Government that the mode of recruitment by way of "contract recruitment" may also be prescribed in addition to other mode of recruitment in all the Recruitment and Promotion Rules.*
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> *It is, therefore, requested that all existing Recruitment & Promotion Rules where the mode of direct recruitment of the post has been prescribed, the same may be amended. As such provision of Col. No. 10 of the Recruitment and Promotion Rules be prescribed in the following manner:-*
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> *"Col. No. 10: By direct recruitment or on contract basis."*

Since the matter has already been approved by the Council of Ministers, it is therefore, requested to amend the Recruitment & Promotion Rules accordingly without referring the matter to the Cabinet."

Thereafter, fresh instructions were also issued by the Principal Secretary (Finance), Government of Himachal Pradesh vide Annexure R-2, dated 17th December, 2004, whereby all the vacancies in functional departments were to be filled up by way of contract basis only. In sequel to Annexure R-1, dated 12.12.2003, the draft Recruitment and Promotion Rules for the post of Junior Scale Stenographer were sent to the State Government for approval on 30.03.2007. Rule-15A was inserted in the old Rules. These rules were approved by the State Government on 23.07.2010 vide Annexure R-4. According to the Rules notified on 23.07.2010, the pay scale of Junior Scale Stenographer as regular incumbent was in the pay band of ₹5910-20200+Grade Pay Rs.2800/- and emoluments for contract employees were ₹8710/- contractual fixed amount per month.

12. The requisition for filling up the post of Junior Scale Stenographer has been sent by the respondent No. 1 to respondent No. 2 on 09.04.2007. A copy of the relevant Recruitment and Promotion Rules for the post of Junior Scale Stenographer was also enclosed. In form No. 23, the name of the post is reflected as Junior Scale Stenographer in the pay scale of ₹4020-6200+₹150/-Secretariate Allowance. The post was to be filled up by way of direct recruitment. In column No. 3(a), it is specifically mentioned that the rules for post of Junior Scale Stenographer have been framed and notified on 28.03.1995.

However, in column No. 3(b), it was mentioned that the post was to be filled up 100% by direct recruitment or on contract basis as per the provision made in the draft Recruitment and Promotion Rules. The essential qualifications have also been prescribed in Col. No. 7 of Annexure R-5, dated 9th April, 2007.

13. The respondent No. 2 has issued an advertisement bearing No. 11 of 2007, dated 12.07.2007 vide Annexure R-6. According to the advertisement, the applications were invited for filling up the posts of Junior Scale Stenographer by 14.08.2007 in the pay scale of ₹4020-6200+₹150 Secretariat Allowance. In sequel to the advertisement issued on 12.07.2007, the respondent No. 2 started the selection process. The petitioner has submitted the application for considering her candidature for the post of Junior Scale Stenographer. The name of the petitioner was recommended by respondent No. 2 on 07.10.2008. However, vide Annexure P-8, dated 20th October, 2008, it is stated that the name of the petitioner was recommended for appointment by respondent No. 2 on contract basis for the post of Junior Scale Stenographer in the pay scale of ₹4020-6200+₹150/- Secretariat Allowance. Thereafter, as noticed above, Annexure P-9 was issued appointing the petitioner on contract basis for a period of one year on the contractual amount of ₹6030/- per month. The petitioner has also signed an agreement. The petitioner has made representations vide Annexures P-11, dated 08.06.2009 and P-12, dated 23.02.2010, seeking appointment on regular basis. Petitioner has also sought information from the respondent No. 2 with regard to nature of appointment. The petitioner was informed by the respondent No. 2 that the posts were advertised on regular basis. All the procedure as laid down

by the Government has been followed and the recommendations were also made on the basis of requisition. The Hon'ble Lokayukta has passed the order, dated 12.06.2012, in sequel to the judgment, dated 20.03.2012. The Court has gone through the contents of Annexure P-20, dated 12.06.2012 minutely.

14. What emerges from the facts enumerated hereinabove, is that according to the Recruitment and Promotion Rules placed on record vide Annexure PR-2, dated 28th March, 1995, the post of Junior Scale Stenographer, was to be filled up by way of direct recruitment. In these rules, there is no provision for making appointment on contract basis. These rules were also brought to the notice of the competent authority at the time when the process for filling up the post of Junior Scale Stenographer commenced. It is nowhere stated in the noting portion, as extracted hereinabove, that the post in question was to be filled up on contract basis. The post of Jamadar was to be filled up on contract basis as per the notings placed on record by the petitioner. In the requisition sent to the respondent No. 2 by the respondent No. 1, the Recruitment and Promotion Rules were also annexed. On the date when the requisition was sent, the Recruitment and Promotion Rules notified on 28.03.1995 were in vogue. It is clear from the phraseology employed in policy decision, dated 12.12.2003 that though the decision has been taken to fill up the post on contract basis, but there was corresponding duty on the employer to amend the Recruitment and Promotion Rules. In the present case, the process for making amendment in the Recruitment and promotion Rules for filling up the posts of Junior Scale Stenographers commenced only on 30.03.2007. When the requisition was sent and the advertisement was

issued, the draft rules were not finalized. The draft rules have been finalized/ approved only on 23.07.2010, wherein the provision has been made to fill up the post of Junior Scale Stenographer on fixed pay on contract basis. The rules notified on 23.07.2010 would apply prospectively and could not apply retrospectively to the process which has already commenced on the basis of the requisition sent to the respondent No. 2 by the respondent No. 1 and the advertisement issued on 12.07.2007. In the recommendation made by the respondent No. 2 to the respondent No. 1, the expression 'contract' has not been mentioned. What has been mentioned in Annexure P-7, dated 07.10.2008, is that pursuant to the screening test as well as skill test, the names of the petitioner alongwith one Asha Verma have been recommended to the posts of Junior Scale Stenographer in the pay scale of ₹4020-6200+₹150/- Secretariat Allowance. However, surprisingly, in Annexure P-8, it is stated that the name of the petitioner has been recommended by the respondent No. 2 on contract basis. This is factually incorrect. The petitioner instead of being offered regular appointment on the basis of recommendation made on 07.10.2008, has been offered appointment on contract basis vide Annexure P-9 on 28.11.2008. The petitioner has joined her duties on 01.01.2009.

15. Mr. Pramod Thakur, learned Additional Advocate General has also argued that once the petitioner has submitted the joining report and signed the agreement, she is precluded from seeking appointment on regular basis.

16. There cannot be any estoppel against the fundamental and legal rights. Petitioner has gone through the process of regular appointment and the regular appointment

could not be denied to her by misconstruing Annexure P-7, dated 07.10.2008.

17. In **Murarilal** Vs. **Balkisan and another**, A.I.R. 1926 Nagpur 416, the expression "acquiescence and laches" has been explained as under:

> *"The word "acquiescence" is used in two sences; sometimes it is used to denote conduct which is evidence of an intention by the party conducting himself to abandon an equitable right; sometimes to denote conduct from which another party would be justified in inferring such an intention, i.e., it is sometimes employed as equivalent to conduct which amounts to a release and sometimes as equivalent to conduct which creates an estoppel or constitutes a promise, for which the acts of the defendant supply a consideration. Acquiescence, properly speaking, relates to inaction during the performance of an act; laches relates to the delay after the act is done. So to fix acquiescence upon a party it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded and to which it refers. (Collett, page 60). I have already stated above that there is nothing in the pleading regarding laches, that is delay, after the act is done, and still the District Judge has based his judgment upon that. Laches to bar the plaintifff's right must amount to waiver, abandonment or acquiescence and to raise a presumption of any of these, the evidence of conduct must be 'plain and unambiguous: Peer Mohmed Dewji V. Mahomed Ebrahim (3) and Kissen Gopal Sadaney V. Kally Prosonno Seth (4). Delay may imply and be evidence of release or abandonment of right.*
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> *To circumstances always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause the balance of justice or*

injustice in taking the one course or the other, so far as relates to the remedy."

18. The Apex Court in **Basheshar Nath** V. **Commissioner of Income-tax, Delhi and Rajasthan and another**, A.I.R. 1959 Supreme Court 149 (V 46 C 22) has held that a person cannot waive breach of fundamental rights. Their Lordships have held as under:

"13. Article 14 runs as follows :-

"The State shall not deny to any Person equality before the law or the equal protection of the laws within the territory of India."

It is the first of the five Articles grouped together under the heading "Right to Equality." The underlying object of this Article is undoubtedly to secure to all persons, citizens or non- citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall "deny to any person within its jurisdiction the equal protection of the laws". There can, therefore be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States. Coming then to the language of the Article it must be noted, first and foremost that this Article is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other Articles, e. g., Art. 19, do. The obligation thus imposed on the State no doubt, enures for the benefit of all persons, for, as a necessary result of the operation of this Article, they all enjoy equality before the law. That is, however, the indirect, though necessary and inevitable, result of the mandate The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the

fundamental right which every person within the territory of India is to enjoy. The next thing to notice is that the benefit of this Article is not limited to citizens, but it available to any person within the territory of India. In the third place it is to be observed that, by virtue of Art. 12, " the State" which is, by Art. 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. As regards the legislative organ of the State, the fundamental right is further consolidated and protected by the provisions of Art. 13. Cl. (1) of that Article provides that all laws in force in the territories of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III shall, to the extent of the inconsistency be void. Likewise . cl. (2) of this Article prohibits the State from making any law which takes away or abridges the rights conferred by the same Part and follows it up by saying that any law made in contravention of this clause shall, to the extent of the contravention, be void. It will be observed that, so far as this Article is concerned, there is no relaxation of the restriction imposed by it such as there are in some of the other Articles, e.g., Art. 19, cls. (2) to (6). Our right to equality before the law is thus completely and without any exception secured from all legislative discrimination. It is not necessary, for the purpose of this, appeal to consider whether an executive order is a "law" within the meaning of Art. 13, for even without the aid Art. 13, our right to the equal protection of the law is protected against the vagaries, if any, of the executive Government also. In this connection the observations of Lord Atkin in

Eshugbayi Eleko v. Officer Administration Government of Nigeria, 1931 A C 662 (A I R 1981 P .C 248) are apposite. Said his Lordship at page 670 (of A C) : (at p. 252 of A I R) that in accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except when he can support the legality of his act before a Court of justice. That apart, the very language of Art. 14 of the Constitution expressly directs that "the State", which by Art. 12 includes the executive organ, shall not deny to any person equality before the law or the equal protection of the law. Thus Art. 14 protects us from both legislative and executive tyranny by way of discrimination.

14. Such being the true intent and effect of Art. 14 the question arises, can a breach of the obligation imposed on the State be waived by any person ? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may do so ? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no, objection to my doing it." I do not think the state will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear,' on the language of Art. 14 that it is a command issued by the Constitution to the State a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every Welfare State, such as India, is by her Constitution

expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State.

53. I would hold, therefore, that the decisions of this Court relied on by the learned Attorney General do not help him in establishing waiver. Let me now examine the circumstances on which the learned Attorney General founds his plea of waiver. Indeed, it is true that the assessee submitted to the discriminatory procedure applied to him by the Commission; he also asked for a settlement under which he agreed to pay. 75% of his alleged tax liability and a small amount of penalty; he made some payment in instalments even after Muthia's decision in December 1955 ((S) AIR 1956 SC 269). Do these circumstances amount to waiver? It is to be remembered that in 1953-1954 when the discriminatory procedure of the Act was applied to him and the report against him was made by the Commission on which the settlement is based, the assessee did not know, nor had it been declared by a Court of competent jurisdiction that S. 5 (1) of the Act was ultra vires. In his application for a settlement, he said clearly in para. 3 that the Commission announced it as its view that the income, profits and gains that had escaped assessment in the hands of the assessee was Rs. 4,47,915. The assessee also knew that under the Act this finding was final and binding on him. If in these circumstances, the assessee made an application for settlement, can it be said that it is a voluntary or intentional relinquishment of a known right ? I venture to think not. It has been said that 'waiver' is a trouble some term in the law. The generally accepted connotation

is that to constitute 'waiver', there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege. Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right, estoppel is a rule of evidence. (See Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha, 62 Ind App 100 at p. 108 : (AIR 1935 P C 79 at p. 82). What is the known legal right which the assessee intentionally relinquished or agreed to release in 1953-1954? He did not know then that any part of the Act was invalid, and I doubt if in the circumstances of this case, a plea of 'waiver' can be founded on the maxim of 'ignorance of law is no excuse'. I do not think that the maxim 'ignorance of law is no excuse' can be carried to the extent of saying that every person must be presumed to know that a piece of legislation enacted by a legislature if competent jurisdiction must be held to be invalid, in case it prescribes a differential treatment, and he must, therefore, refuse to submit to it or incur the peril of the bar of waiver being raised against him. I do not think that such prescience is a necessary corollary of the maxim. On the contrary, the presumption, if any, which operated at the relevant time was the presumption that a law passed by a competent legislature is valid, unless declared unconstitutional by a Court of competent jurisdiction. Furthermore, I do not think that any inference of waiver can be retrospectively drawn from the instalments paid in 1956-57, particularly when the question of refund of the amounts already paid is no longer a live issue before us. It would, I think, be going too far to hold that every unsuspecting submission to a law, subsequently declared to be invalid, must give rise to a plea of waiver: this would make constitutional rights depend for their vitality, on

the accident of a timely challenge and render them illusory to a very large extent."

In the instant case, the action of not appointing the petitioner on regular basis is violative of Articles 14 and 16 of the Constitution of India. Petitioner's right to equality has been infringed by appointing her on contract basis instead of on regular basis.

19. The Apex Court in **Associated Hotels of India** Ltd. Vs. **S.B. Sardar Ranjit Singh**, AIR 1968 Supreme Court 933 (V 55 C 186) has explained the expression 'Waiver' as under:

"14. It is argued that the respondent waived the requirement of consent to the sub-letting. Any sub-letting in breach of the provisions of Cl. (b) of the proviso to S. 13 (1) is an offence punishable under S. 44. Assuming that the landlord can waive the requirement as to consent, it is not shown that the respondent-waived it. A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights. See Dhanukdhari Singh v. Nathima Sahu, (1907) 7 Cal WN 848 at p. 852. It is said that the respondent knew of the sub-lettings as he frequently visited the hotel. It appears that he visited the hotel up to 1953 and he must have known of the occupation of R. N. Kapoor, Indian Art Emporium and Pan American World Airways. But he came to know of the other lettings in January 1958 only. Moreover, the precise nature of the grant was never communicated to the respondent. The Courts below rightly held that the respondent did not waive his right to evict the appellant on the grounds mentioned in Cls. (b) and (c) of the proviso to S. 13 (1).

20. Their Lordships of the Hon'ble Supreme Court in **M/s. Motilal Padampat Sugar Mills Co. Ltd.** Vs. **The State of Uttar Pradesh and others**, AIR 1979 Supreme Court 621 have explained the term 'Waiver' as under:

> *"6. Secondly, it is difficult to see how, on the facts, the plea of waiver could be said to have been made out by the State Government. Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be "an intentional act with knowledge," per Lord Chelmsford, L. C. in Earl of Darnley v. London, Chatham and Dover Rly. Co., (1867) 2 HL 43 at p. 57. There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abondons it. It is pointed out in Halsbury's Laws of England (4th ed) Vol. 16 in papa. 1472 at p. 994 that for a "waiver to be effectual it is essential that the person granting it should be fully informed as to his rights" and Isaacs, J. delivering the judgment of the High Court of Australia in Craine v. Colonial Mutual Fire Insurance Co. Ltd. (1920) 28 CLR 305 has also emphasised that waiver "must be with knowledge, an essential supported by many authorities." Now in the present case there is nothing to show that at the date when the appellant addressed the letter dated 25th June, 1970, it had full knowledge of its right to exemption under the assurance given by the 4th respondent and that it intentionally abandoned such right. It is difficult to speculate what was the reason why the appellant addressed the letter dated 25th June, 1970 stating that it would avail of the concessional rates of sales tax granted under the letter dated 20th Jan., 1970. It is possible that the appellant might have thought that since no notification exempting the appellant from sales tax had been issued by the State Government under Sec, 4A, the appellant was legally not entitled*

to exemption and that is why the appellant might have chosen to accept whatever concession was being granted by the State Government. The claim of the appellant to exemption could be sustained only on the doctrine of promissory estoppel and this doctrine could not be said to be so well defined in its scope and ambit and so free from uncertainty in its application that we should be compelled to hold that the appellant must have had knowledge of its right to exemption on the basis of promissory estoppel at the time when it addressed the letter dated 25th June, 1970. In fact in the petition as originally filed, the right to claim total exemption from sales tax was not based on the plea of promissory estoppel which was introduced only by way of amendment. Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that every one is presumed to know the law, but that is not a correct statement: there is no such maxim known to the law. Over a hundred and thirty years ago, Maule J., pointed out in Martindale v. Falkner, (1846) 2 CB 706 "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so". Scrutton, L. J., also once said: "It is impossible to know all the statutory law, and not very possible to know all the common law." But it was Lord Atkin who, as in so many other spheres, put the point in its proper context when he said in Evans v. Bartlam, 1937 AC 473"..... the fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application." It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dtd. 25th June, 1970. We accordingly reject the

plea of waiver raised on behalf of the State Government.

21. Their Lordships of the Hon'ble Supreme Court in **Provash Chandra Dalui and another** Vs. **Biswanath Banerjee and another**, AIR 1989 Supreme Court 1834 have explained the expression 'Waiver and estoppel' as under:

> *"21. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right. It means the forsaking the assertion of a right at the proper opportunity. The first respondent filed suit at the proper opportunity after the land was transferred to him, and no covenant to treat the appellants as Thika tenants could be shown to have run with the land. Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estopped. An estoppel may result though the party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in question. Nothing of the kind could be proved in this case to estopp the first respondent.*

22. Their Lordships of the Hon'ble Supreme Court in **The Rajasthan State Industrial Development and Investment Corporation** Vs. **Subhash Sindhi Cooperative Housing Society Jaipur & Ors.**, JT 2013 (3) SC 1 have held that there cannot be estoppel against law and public policy. Their Lordships have held as under:

> *"23. Be that as it may, there can be no estoppel against the law or public policy. The State and statutory authorities are not bound by their previous erroneous understanding or interpretation of law. Statutory authorities or legislature cannot be asked to act in contravention of law. "The statutory body cannot be estopped from denying that it has entered into a contract which was ultra vires for it to make. No corporate body can be bound by estoppel to do something beyond its powers, or to refrain from doing what it is its duty to do." Even an offer or concession made by the public authority can always be withdrawn in public interest. (Vide: State of Madras & Anr. V. K.M. Rajagopalan (AIR 1955 SC 817); Badri Prasad & Ors. V. Nagarmal & Ors. (AIR 1959 SC 559); and Dr. H.S. Rikhy etc. V. The New Delhi Municipal Committee (AIR 1962 SC 554)}.*

23. Mr. Pramod Thakur, learned Additional Advocate General has also argued on the basis of the pleadings in the reply filed by respondent No. 1 that in fact the decision has been taken to fill up the posts of Junior Scale Stenographers on contract basis. This submission also merits rejection. The Court has reproduced the relevant portion of the notings placed on record by the petitioner, whereby the process for appointment to the post of Junior Scale Stenographer has commenced. It is nowhere stated in the noting portion that the post of Junior Scale Stenographer was to be filled up on contract basis, rather what has been stated in the noting portion, is that the rules governing the appointment to the post of Junior Scale Stenographer were notified by the Home Department on 28.03.1995. Since the draft rules were only approved on 23.07.2010, the appointment of the petitioner was to be made on regular basis as per the Recruitment and Promotion Rules notified in the year 1995. The requisition for filling up the post in question was accompanied by the rules framed under Article

309 of the Constitution of India and the same could not be diluted on the basis of draft rules.

24. What has been stated in the form appended with the requisition, is that the post was to be filled up 100% by way of direct recruitment in the regular pay scale or on contract basis as per the provisions made in the draft Recruitment and Promotion Rules. It is reiterated that since the rules have already been framed under Article 309 of the Constitution of India, the appointment could not be made on the basis of draft Recruitment and Promotion Rules. In column No. 1 of form No. 23, the pay scale of Junior Scale Stenographer has been mentioned as ₹4020-6200+₹150/- Secretariat Allowance. This pay scale has also been mentioned in requisition letter, dated 09.04.2007. The respondent No. 2 has also mentioned the same pay scale while making appointment of petitioner as Junior Scale Stenographer vide Annexure P-7, dated 07.10.2008. The petitioner was in possession of the essential minimum educational qualification. She has passed the screening test and skill test held by the respondent No. 2. The petitioner has made representations for the redressal of her grievance within a period of six months. The respondent No. 1 has superior bargaining power vis-à-vis petitioner. One Asha Verma, who was selected with the petitioner, was also appointed on contract basis. She has submitted her joining conditionally, but the same was not accepted, as is evident from Annexure P-10, dated 11.12.2008. Even if the petitioner has made representation immediately on joining, the same would have been rejected, as has been done in the case of Asha Verma.

25. It is also evident from Annexure P-20, dated 12.06.2012 that the matter was sent by the respondent No. 1 to the Secretary (Vigilance) on 18.03.2010 for clarification. The Additional Secretary (Vigilance), Government of Himachal Pradesh vide letter, dated 26.02.2011, has sent the following reply:

> *"I am directed to refer to your letter No. Loka-2(B)2-2/2007 dated 6.1.2010 on the subject cited above and to say that the matter has been examined in this Department and found that the official has no case as the post was advertised on contract and she was appointed on contract in terms of advertisement for the post. You are, therefore, requested to file reply accordingly in CWP No. 7769/2010 before the Hon'ble High Court."*

26. There is factual error in the letter, dated 12.06.2012. The post was never advertised on contract basis, as stated in this letter. When the process was initiated, the requisition was sent and the advertisement was published, the word 'contract basis' was not mentioned. The post was advertised on regular basis and the petitioner was required to be offered regular appointment. The agreement entered into by the petitioner with respondent No. 1 was also unconscionable being violative of Article 14 of the Constitution of India. Petitioner has the choice either to accept the appointment or to forego the same. In view of this, the principle of acquiescence/waiver will not be attracted. The appointment of the petitioner was regulated as per the Recruitment and Promotion Rules framed under Article 309 of the Constitution of India and not on the basis of proposed draft Recruitment and Promotion Rules, which were approved by the State Government only on 23.07.2010. By

the time the draft Recruitment and Promotion Rules for the post of Junior Scale Stenographer were approved on 23.07.2010, the entire selection process has culminated and the recommendation of the petitioner's name was made by the respondent No. 2 to the respondent No. 1 on regular basis and not on contract basis.

27. The appointment of the petitioner was to be regulated as per the Recruitment and Promotion Rules framed under Article 309 of the Constitution of India and not on the basis of policy decision taken by the State Government on 12.12.2003 and draft rules. It is true that no candidate has an indefeasible right to be appointed even his name is reflected in the select list, but the decision to deny the appointment has to be taken in a reasonable and fair manner.

28. Their Lordships of the Hon'ble Supreme Court in **Asha Kaul and another** Vs. **State of Jammu and Kashmir and others** (1993) 2 Supreme Court Cases 573 has held that mere inclusion in the select list does not confer upon the candidates included therein an indefeasible right to appointment but that is only one aspect of the matter. The other aspect is the obligation of the Government to act fairly. Their Lordships have further held that the whole exercise cannot be reduced to a farce. Their Lordships have held as under:

> *"8. It is true that mere inclusion in the select list does not confer upon the candidates included therein an indefeasible right to appointment (State of Haryana v. Subhash Chander Marwaha Mani Subrat Jain v. State of Haryana, State of Kerala v. A. Lakshmikutty) but that is only one aspect of the matter. The other aspect is the obligation of the government to act fairly. The whole exercise cannot*

be reduced to a farce. Having sent a requisition/request to the Commission to select a particular number of candidates for a particular category, - in pursuance of which the Commission issues a notification, holds a written test, conducts interviews, prepares a select list and then communicates to the government the government cannot quietly and without good and valid reasons nullify the whole exercise and tell the candidates when they complain that they have no legal right to appointment. We do not think that any government can adopt such a stand with any justification today. This aspect has been dealt with by a Constitution bench of this court in Shankarsan Dash v. Union of India where the earlier decisions of this court are also noted. The following observations of the court are apposite:

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, Neelima Shangla v.

State of Haryana or Jatendra Kumar v. State of Punjab."

29. Their Lordships of the Hon'ble Supreme Court in **Vijay Kumar Sharma and others** Vs. **Chairman, School Service Commission and others** (2001) 4 Supreme Court Cases 289, where pursuant to advertisement issued by School Service Commission for filling up vacancies in Schools run by them, the appellant appeared and empanelled, the vacancies were also existing, in these circumstances, their Lordships have held that the denial of appointment to the appellant and allowing the panel to lapse was unjustified. Their Lordships have held as under:

> *"8. Appellant No. 1 belongs to the OBC Category. For reasons best known to the Respondents, even though the life of the panel for General Category has been extended to 2nd February, 2002, the same has not been done for the panel of the OBC Category. It has been pointed out to us that in the OBC Category there were vacancies, yet Appellant No. 1 was not appointed and the panel allowed to lapse. We see no justification for not appointing Appellant No. 1 when vacancies were available. We also see no justification for not extending the panel life of the OBC Category. We, therefore, direct that Appellant No. 1 will be appointed against the vacancies which are available in the OBC Category.*

30. Their Lordships of the Hon'ble Supreme Court in **Secy. Deptt. of Home Secy., A.P. and others** Vs. **B. Chinnam Naidu** (2005) 2 Supreme Court Cases 746 have held that denial of appointment to a candidate, who is selected, has to be governed by some statutory provisions even though he has no right to that appointment. Their Lordships have held as under:

> *"11. The question whether he was a desirable person to be appointed in government service was not the*

subject-matter of adjudication and the Tribunal was not justified in recording any finding in that regard. Whether a person is fit to be appointed or not is a matter within the special domain of the Government. For denying somebody appointment after he is selected, though he has no right to be appointed, has to be governed by some statutory provisions. That was not the issue which was to be adjudicated in the present case. The only issue related to suppression of facts or misdeclaration."

31. Their Lordships of the Hon'ble Supreme Court in **Food Corpn. of India and others** Vs. **Bhanu Lodh and others** (2005) 3 Supreme Court Cases 618 have held that the decision not to fill up the vacancies has to be taken bonafide and must pass the test of reasonableness so as not to fail on the touchstone of Article 14 of the Constitution. Their Lordships have further held that if the vacancies are proposed to be filled, then the State is obliged to fill them in accordance with merit from the list of the selected candidates. Their Lordships have held as under:

"14. Merely because vacancies are notified, the State is not obliged to fill up all the vacancies unless there is some provision to the contrary in the applicable rules. However, there is no doubt that the decision not to fill up the vacancies, has to be taken bona fide and must pass the test of reasonableness so as not to fail on the touchstone of Article 14 of the Constitution. Again, if the vacancies are proposed to be filled, then the State is obliged to fill them in accordance with merit from the list of the selected candidates. Whether to fill up or not to fill up a post, is a policy decision, and unless it is infected with the vice of arbitrariness, there is no scope for interference in judicial review. (See in this connection Govt. of Orissa v. Haraprasad Das and State of Orissa v. Bhikari Charon Khuntia.)

32. Their Lordships of the Supreme Court in **Union of India and others** Vs. **Pritilata Nanda** (2010) 11 Supreme Court Cases 674 have held that once the candidate allowed to participate in selection process, it was not open to turn around and question the candidature on specious grounds and their Lordships have declared the denial of appointment as illegality. The Apex Court has held as under:

> *"21. We also agree with the High Court that once the candidature of the respondent was accepted by the concerned authorities and she was allowed to participate in the process of selection i.e., written test and viva voce, it was not open to them to turn around and question her entitlement to be considered for appointment as per her placement in the merit list on the specious ground that her name had not been sponsored by the employment exchange. In our considered view, by denying appointment to the respondent despite her selection and placement in the merit list, the appellants violated her right to equality in the matter of employment guaranteed under Article 16 of the Constitution."*

33. The Apex Court in **East Coast Railway and another** Vs. **Mahadev Appa Rao and others** (2010) 7 Supreme Court Cases 678 had held that power conferred on an authority is held by that authority in trust and the power must be exercised for legitimate purposes. Their Lordships have further held that while no candidate acquires an indefeasible right to a post merely because he has appeared in the examination or even found place in the select list, yet the State does not enjoy an unqualified prerogative to refuse an appointment in an arbitrary fashion or to disregard the merit of the candidates as reflected

by the merit list prepared at the end of the selection process. Their Lordships have held as under:

> *"14. It is evident from the above that while no candidate acquires an indefeasible right to a post merely because he has appeared in the examination or even found a place in the select list, yet the State does not enjoy an unqualified prerogative to refuse an appointment in an arbitrary fashion or to disregard the merit of the candidates as reflected by the merit list prepared at the end of the selection process. The validity of the State's decision not to make an appointment is thus a matter which is not beyond judicial review before a competent Writ court. If any such decision is indeed found to be arbitrary, appropriate directions can be issued in the matter.*
>
> *15. To the same effect is the decision of this Court in Union Territory of Chandigarh v. Dilbagh Singh and Ors. (1993) 1 SCC 154, where again this Court reiterated that while a candidate who finds a place in the select list may have no vested right to be appointed to any post, in the absence of any specific rules entitling him to the same, he may still be aggrieved of his non-appointment if the authority concerned acts arbitrarily or in a malafide manner. That was also a case where selection process had been cancelled by the Chandigarh Administration upon receipt of complaints about the unfair and injudicious manner in which the select list of candidates for appointment as conductors in CTU was prepared by the Selection Board. An inquiry got conducted into the said complaint proved the allegations made in the complaint to be true. It was in that backdrop that action taken by the Chandigarh Administration was held to be neither discriminatory nor unjustified as the same was duly supported by valid reasons for cancelling what was described by this Court to be as a "dubious selection".*

> *16. Applying these principles to the case at hand there is no gainsaying that while the candidates who appeared in the typewriting test had no indefeasible or absolute right to seek an appointment, yet the same did not give a licence to the competent authority to cancel the examination and the result thereof in an arbitrary manner. The least which the candidates who were otherwise eligible for appointment and who had appeared in the examination that constituted a step in aid of a possible appointment in their favour, were entitled to is to ensure that the selection process was not allowed to be scuttled for malafide reasons or in an arbitrary manner.*
>
> *17. It is trite that Article 14 of the Constitution strikes at arbitrariness which is an anti thesis of the guarantee contained in Articles 14 and 16 of the Constitution. Whether or not the cancellation of the typing test was arbitrary is a question which the Court shall have to examine once a challenge is mounted to any such action, no matter the candidates do not have an indefeasible right to claim an appointment against the advertised posts.*

34. Accordingly, in view of the discussions and analysis made hereinabove, the writ petition is allowed. Annexure P-20, dated 12.06.2012, is quashed and set aside. The petitioner shall be deemed to have been appointed on regular basis as Junior Scale Stenographer with all consequential benefits, including monetary benefits w.e.f. 01.01.2009. The appointment letter, dated 28.11.2008, Annexure P-9, shall be substituted to this effect by applying the principles of severability. The pending application(s), if any, also stands disposed of. No costs.

(Rajiv Sharma)
Judge

February 28, 2013.
(bhupender)